Supreme Court, U. S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1979

No. — 79-885

RICHARD LEON SHERMAN,
*Petitioner,*

v.

STATE OF MARYLAND,
*Respondent.*

**PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF THE STATE OF MARYLAND**

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No. _____

RICHARD LEON SHERMAN,
*Petitioner,*

v.

STATE OF MARYLAND,
*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF THE STATE OF MARYLAND

Petitioner, RICHARD LEON SHERMAN, prays that a writ of certiorari issue to review the opinion and judgment of the Court of Special Appeals of the State of Maryland, rendered in these proceedings on June 4, 1979. Certiorari by the Court of Appeals of the State of Maryland was denied on September 10, 1979.

## OPINIONS BELOW

The unreported opinion of the Court of Special Appeals of the State of Maryland appears at Appendix A, *infra,* pp. 1a-8a. The denial of a petition for

certiorari by the Court of Appeals of the State of Maryland appears at Appendix B, *infra*, at p. 8a-9a.

## JURISDICTION

The Order of the Court of Appeals of the State of Maryland was entered on September 10, 1979. This petition was filed less than 90 days thereafter. The jurisdiction of this Court is based on 28 U.S.C. 1257(3).

## QUESTIONS PRESENTED

I. Whether the State's failure to release the name and address of its informant-participant prior to trial, resulting in the informant's unavailability at trial is a denial of due process of law.

II. Whether the State's failure to physically produce its informant-participant after request by the defense to substantiate an entrapment defense is a denial of due process of law.

III. Whether a defendant may be held to have impliedly waived fundamental rights which guarantee a fair trial to an accused, in the face of trial strategy which is grounded on the assertion of those very rights.

## CONSTITUTIONAL PROVISIONS

United States Constitution amendment XIV, § 1: "nor shall any State deprive any person of life, liberty, or property without due process of law."

Rules of Court:

Annotated Code of Maryland, Volume 9B

Rules of Procedure:

Rule 527, page 328

Rule 741, page 103 (1979 cumulative supplement)

(The full text of these rules is set out in Appendix D).



## STATEMENT OF FACTS

The petitioner, Richard Leon Sherman, was convicted of the distribution of marijuana in violation of Maryland State law, having sold approximately one pound to an undercover agent, Trooper Mickey Norman, at a meeting on January 20, 1977. The meeting was arranged and attended by a police informant, who had identified herself to petitioner as Janice Carr.

Petitioner's defense at trial was entrapment, on the theory that a woman named Janice Carr, who both arranged and attended the meeting of January 20, 1977, induced the sale of the marijuana by the petitioner through the promise of sexual favors. Although the precise whereabouts of Janice Carr were not known, petitioner issued a summons for her appearance, as well as issuing a pre-trial motion to produce the informant, filed October 25, 1977.

In the pre-trial motion, petitioner apprised the State that his defense would be entrapment and that it was therefore necessary to secure the presence of Janice Carr. Petitioner requested that the Court order the State to produce Ms. Carr, since she alone possessed the exculpatory evidence which could corroborate Mr. Sherman's testimony to establish entrapment.

Three weeks later (November 16, 1977), at the hearing on this motion, the prosecutor agreed to make efforts to locate Ms. Carr (T. 3, p. 161). In light of this voluntary compliance, the Motions Judge expressed no compelling need to sign the order requiring the State to produce Ms. Carr. Petitioner continued his own efforts, through contacts with Ms. Carr's family, to try and locate her.

At trial, on November 28, 1977 (four weeks after filing the original motion to produce the government informant and one week after the prosecutor's promise of assistance in locating her), the State had still not

provided any information with respect to her present whereabouts. In spite of this fact, the Trial Judge formally denied the October 25, 1977 motion to produce (T. 41). On the final day of trial, the State revealed for the first time, through the testimony of Trooper Norman, that the real identity of the informant was Darlene Jaworski and not Janice Carr, although the trooper acknowledged that Ms. Jaworski may have given her name as Janice Carr to the petitioner (T. 14-15). Trooper Norman further revealed that no attempt whatever had been made to locate or provide the address of either Janice Carr or Darlene Jaworski to the petitioner, despite the particularization of the need for such witness' testimony (T. 23-24).

The defense made an oral motion to have the State produce Darlene Jaworski, and later filed a formal written motion to produce on December 2, 1977. Two summons were also issued by the defense, directed to the different addresses thought to be current for Ms. Jaworski. After the defendant testified, a continuance was requested for additional time to locate Darlene Jaworski and to be given an opportunity to subpoena her to trial (T. 116). Two weeks were granted by the court for these purposes (T. 121). Before this continuance was ordered, additional testimony had been elicited by the defendant with respect to the whereabouts of both Janice Carr and Darlene Jaworski. Darlene Jaworski's ex-husband, Edward Jaworski, testified that to the best of his knowledge, Ms. Carr was sent by State or Federal authorities to Hawaii in February or March of that year, and that Darlene had gone out to Hawaii "just recently" to join Ms. Carr. (Janice Carr and Darlene Jaworski are sisters) (T. 113-114). At no time prior to or during the trial did the State give to the defendant the current address of either individual sought by the defense.



During the two-week continuance, the defendant made numerous efforts to locate both sisters. Letters were sent to last-known addresses, summonses were issued and relatives were contacted, all to no avail.

After the two-week continuance, defense testimony revealed that Janice Carr had written three letters to Bernadette Carr, her sister-in-law, over a seven-month period, the envelopes all bearing Hawaiian names and different return addresses. The defense, being unable to locate either of the sisters, rested its case. The Court found that petitioner had not met his initial burden of establishing an entrapment defense and convicted him.

## REASONS FOR GRANTING THE WRIT

### 1. THE DECISION BELOW DIRECTLY CONFLICTS WITH THE DUE PROCESS PRINCIPLES OF THE ROVIARO DECISION.

The Maryland Court of Special Appeals erroneously misapplied this Court's ruling in *Roviaro v. United States*, 353 U.S. 53, 77 S. Ct. 623 (1957), by allowing the State to fail to disclose the name of its informant. The informant, Darlene Jaworski, was the only eyewitness who could corroborate petitioner's story concerning the number and nature of prior contacts made in setting up the drug transaction for which petitioner was convicted. The informant's true name was never supplied to petitioner until after that informant was no longer available for questioning on the witness stand or in preparation of the defendant's case. Indeed, a current address for the informant was never supplied. This failure was in the face of the proper procedural request by the defendant filed well in advance of the November 28, 1977 trial date. This failure to supply the name and address of the informant was compounded by the State's silence after being apprised, by the filing of a motion, that the defendant was looking for an individ-

ual named Janice L. Carr (Motion to Produce, p. 1). The State knew or should have known that this was a false name given by Darlene Jaworski to the defendant. This motion, requesting a court order compelling the State's assistance in locating the informant, was also filed well in advance of trial. Further, knowing that the defendant was looking for a person altogether different from the actual informant, the State affirmatively misled the Court and defense counsel not only by its silence as to the true identity of the police informant (Md. Rule § 741(f) imposes a *continuing* duty to disclose), but also by its asserted willingness to exert some effort to locate the person named in the defendant's Motion to Produce. No effort was ever made to locate either the person named by the defendant in his Motion to Produce, or the true police informant, Darlene Jaworski.

On the 25th of October, 1977, the State not only had the defendant's request for the name of the informant actually used, but also knew that the defendant was seeking the wrong person. The defendant's motion of October 25 particularized the type of testimony which he alleged "Janice Carr" would corroborate, that this testimony was exculpatory in nature, that this was the sole witness with the knowledge of such information, and that this witness accompanied Trooper Norman and was present at the commission of the offense. All of this information, viewed in the light cast by this Court's opinion in *Roviaro v. United States, supra,* establishes that the disclosure of the informant's identity would be "relevant and helpful to the defense of the accused or essential to a fair determination. . . ." *Roviaro, supra,* at 60-61. Whether disclosure should be required at all calls for a "balancing of the public interest in protecting the flow of information against *the individual's right to prepare a defense,*" *Roviaro, supra,* at 62 (emphasis added), taking into account "the crime charged, the possible defenses [and] the possible



significance of the informant's testimony." *Supra,* at 62.

This case involves an entrapment defense which could only be corroborated by the testimony of the informant involved. Trooper Norman testified that he met petitioner for the first time on the occurrence of the sale. It was therefore apparent that all arrangements were made through Darlene Jaworski in advance of the drug transaction. It is clear, therefore, that disclosure is required in this case. The question presented is whether the State can comply with the dictates of *Roviaro, supra* by delaying in releasing the informant's identity until the very day of trial at a time that the defendant's ability to locate and interrogate such person in preparation of his defense, or call such person as a witness, has been prejudiced. (By the time the disclosure was made, Ms. Jaworski had already left for Hawaii. Timely disclosure would have found her available for compulsory process in the State of Maryland.)

The decision in *Roviaro* was based in large part on the inherent unfairness of non-disclosure which prevented that defendant's ability to "explain or amplify" the police report of the incident (at p. 64). Petitioner was clearly within the *Roviaro* situation wherein the informant was the only other person besides the petitioner who could corroborate or refute the assertion of entrapment.

Throughout the *Roviaro* decision, reference is made to what might be disclosed by the absent informant, how his testimony might be relevant or helpful, what might be disclosed on direct or cross-examination, the possibility that such testimony might disclose an entrapment, and ability to amplify or contradict testimony of the government witnesses. This is the end sought by the requirement of disclosure in the case at bar, that is, to

give the defendant a *realistic* opportunity to present all the occurrences which led to the ultimate, illegal transaction. *Roviaro, supra,* at 64.

The State's actions in this case, by revealing the name of the informant for the first time at trial, seems to bring this case within the letter of *Roviaro,* in which there was error to refuse disclosure at trial. The effect of holding the State's activity in this case to be a discharge of its duty eviscerates the *ratio decidendi* of *Roviaro* and allows the State to retain its practice of non-disclosure, to the prejudice of defendant's right to a fair trial.

### 2. Denial of the Motions to Produce the Informant is a Federal Constitutional question of importance in the administration of justice.

The defense of individuals who have been "set up" by an informer has revealed unique and substantial deficiencies in prosecutorial procedure when such procedure is viewed in the light of the Fourteenth Amendment's guarantee of due process. These deficiencies have been recognized by various federal courts across the country as violating in some instances, the defendants' right to a fair trial. *United States v. Ramsey,* 220 F. Supp. 86 (E.D. Tenn. 1963); *United States v. Rivers,* 406 F. Supp. 709 (E.D. Pa. 1975); *United States v. Pollard,* 479 F.2d 310 (8th Cir. 1973). These cases recognize that allowing the government unilateral discretion in deciding which witnesses should testify often works to substantially prejudice the defendant's ability to prepare an adequate defense in the informer type of situation.

The ability to question and/or cross-examine all the participants to the transaction is an essential aspect to any meaningful check on police methodology. This was



explicitly noted in *Roviaro v. United States,* 353 U.S. 53, 77 S. Ct. 623 (1957). Fundamental fairness requires that the informant's information, which was invaluable in the construction of the government's case, be made available to the defense in order to give meaning to the right of the accused to a fair trial and also his right to compulsory process. *United States v. Pollard,* 479 F.2d 310 (8th Cir. 1973); *United States v. Kitchen,* 488 F.2d 527 (8th Cir. 1973).

With the recognition of this duty on the part of the government to assist in securing a fair trial to the accused *before* he steps into the courtroom, there has been the necessary attempts to define the situations in which the failure of the government to produce (or render assistance in locating) a witness prejudices the accused's right to a fair trial.

Primarily, the cases that have addressed this point state that the accused must show that the missing witnesses' testimony must be relevant to the crime which the accused is defending or the defense he is seeking to establish; *United States v. McQuillan,* 507 F.2d 30 (9th Cir. 1974), and that such testimony might help to exculpate him. *United States v. Jones,* 580 F.2d 785 (5th Cir. 1975); *United States v. Rivers,* 406 F. Supp. 709 (E.D. Pa. 1975).

With respect to any efforts made to locate the witness whose presence the defense deems relevant, the courts have required not only that the defendant himself make reasonable efforts; *United States v. Turbide,* 558 F.2d 1053 (2d Cir. 1977); *United States v. Tatum,* 496 F.2d 1282 (5th Cir. 1974); but where the government makes a reasonable effort on its own, the duty is fully discharged. *White v. United States,* 330 F.2d 811 (8th Cir. 1964), cert. den. 379 U.S. 855; *United States v. Tuck,* 380 F.2d 857 (2d Cir. 1967).

Finally, the courts have held that the defendant must have a request for the production of the witness and absent such, there is no duty on the part of the government to assist in the location, or production of the necessary defense witnesses. *United States v. Fallings,* 482 F.2d 1352 (8th Cir. 1973); *United States v. Webster,* 490 F.2d 435 (8th Cir. 1974).

Viewed in the perspective of the facts incontrovertibly shown by the trial record, petitioner has carried the burden imposed on him to show the merit of his claim. The State, on the other hand, did nothing to assist in locating the informant-participant (T. 23, 24).

It is respectfully submitted that the Maryland State Courts have decided this question in a manner in conflict with the guiding opinions of other courts which have considered the matter and in the absence of any controlling authority from this Court. It is further submitted that the question of the duty on the part of the government to produce its informants is ripe for review by this Court, owing to the frequency with which this particular question arises in the lower federal courts, from all parts of the country, and the failure of the State adequately to protect this fundamental federal right to a fair trial.

### 3. THE DECISION BELOW DIRECTLY CONFLICTS WITH THE WAIVER PRINCIPLES OF THE SCHNECKLOTH DECISION.

The Maryland Court of Special Appeals held that the defendant's request for the production of the informant and the actual demand for physical production of the informant was waived by "failing to request a continuance under Md. Rule 527(c) and choosing to proceed with his motion for judgment of acquittal." *Sherman v. State,* Appendix, p. 4a-5a. This case having been tried without a jury, a Motion for Judgment of Acquittal was



superfluous, however, and not necessary to preserve the issue of sufficiency of the evidence. *Barnes v. State,* 31 Md. App. 25, 354 A.2d 499 (1976); *Duppins v. State,* 17 Md. App. 464, 302 A.2d 717 (1973). The Court's decision on waiver is based on the specific failure of the defendant to request a further continuance after three envelopes bearing different Hawaiian return addresses were revealed in Janice Carr's handwriting. Scrutiny of the statements required in order to satisfy all the prerequisites of a continuance under Md. Rule 527(c) reveals the untenable nature of the Court's holding, particularly when viewed in connection with all of the petitioner's prior efforts and motions made to locate the witness.

For a continuation to be granted to locate a missing witness, Maryland Rule 527(c)(2) requires, *inter alia,* a sworn statement that there is a "reasonable expectation and belief that such witness can be procured within a reasonable time." The Court of Special Appeals reasoned that the production of the three envelopes afforded such a reasonable expectation and belief of timely procurement of the missing witness, and therefore the election to proceed with the Motion for Judgment of Acquittal rather than move for a second continuance obviated any complaint that there was a denial of due process prejudicial to the defendant's rights.

In arriving at this conclusion, the Court fails to note that trial was just resuming after a two-week continuance devoted (on petitioner's part) to the location of this very witness. The fact that the envelopes contain three different return addresses and were all written by Janice Carr no more leads to a reasonable expectation and belief that Darlene Jaworski could be procured within a reasonable time than does the information that was known to defense counsel on November 28, that Darlene Jaworski was somewhere in Hawaii (T. 110,

118-9). The Court of Special Appeals' requirement that the defendant, under Md. Rule 527, swear to the reasonableness of the expectation that Darlene Jaworski can be found and summoned in order to get a continuance and thereby preserve his constitutional rights flies in the face of the facts as they are revealed from the record.

When there is an assertion by the Government that the defendant has waived a right which exists to guarantee the defendant's interest in a fair trial, this Court has required that a strict standard be applied to determine whether such "an intentional relinquishment or abandonment of a known right or privilege," *Schneckloth v. Bustamonte*, 412 U.S. 218, 933 S.Ct. 2041 (1973), did in fact exist. There is no such finding here by the Court of Special Appeals, nor can there be where counsel's trial strategy was based on a vigorous assertion of those very rights. Rather, the Maryland Court seeks to impute such a waiver on the basis of a trial strategy, which does not inherently carry with it the waiver of any rights, much less those of a Constitutional nature. On the facts of this case, there can be no doubt that the particular trial strategy employed was pursued without "sufficient awareness of the likely . . . consequences." *Brady v. United States*, 397 U.S. 742, 90 S.Ct. 1463 (1970).



## CONCLUSION

For the foregoing reasons, it is respectfully requested that this Court issue a Writ of Certiorari to review the decision of the Court of Special Appeals of the State of Maryland.

Respectfully submitted,

LESLIE L. GLADSTONE,
Suite 400,
One East Redwood Street,
Baltimore, Maryland 21202,
Counsel for Petitioner.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY, this ____ day of December, 1979, that three copies of the aforegoing Petition for Writ of Certiorari and Appendices were hand-delivered to the Attorney General, State of Maryland, One South Calvert Street, Baltimore, Maryland 21202, and that all parties required to be served have been served.

Leslie L. Gladstone

## APPENDIX A

*Unreported*

*In The Court Of Special Appeals*
*Of Maryland*
*September Term. 1978*

*No. 1156*

*Richard Leon Sherman*
*v.*
*State Of Maryland*

*Moylan, Wilner, Couch, Judges*

*Per Curiam*

Filed: June 4, 1979

Richard Leon Sherman appeals his December 13, 1977 conviction for distribution of marijuana in violation of Md. Code, Art. 27, § 286(a), by the Circuit Court for Baltimore County, sitting without a jury. The verdict of guilty on two other counts, possession with intent to distribute in violation of Art. 27, § 286, and possession in violation of Art. 27, § 287, were merged with the distribution conviction. Sherman was sentenced on October 23, 1978 to be committed to the

Department of Correction for five years, two and one-half years of this period were suspended. It was further recommended that this sentence run concurrently with any sentence imposed for violation of probation pending in the United States District Court for the District of Maryland.

The events which resulted in appellant's arrest and conviction were the subject of some controversy at trial. On January 20, 1977 a State Trooper, working undercover, entered appellant's apartment accompanied by a woman and, after a short period of time passed, the trooper purchased one pound of marijuana from appellant.[1]

Appellant, believing the woman who accompanied the trooper to be one Janice Carr, filed a motion to compel the State to produce her for trial. It was claimed in the motion that appellant's defense was entrapment by Janice Carr, an agent of the police, who induced the appellant to commit the offense. A hearing was held on the motion on November 16, 1977. According to appellant's proffer, the presiding judge found it unnecessary to grant the motion since the prosecutor agreed to make an effort, through the police and other avenues, to locate Carr.

The trooper, testifying on the first day of trial, November 28, 1977, stated that the woman who accompanied him to appellant's apartment was Darlene Jaworski, not Carr. He further revealed that he had information, two months old, that both Carr and Jaworski, who were sisters, were in either Hawaii or Colorado. Appellant requested a continuance of one week so that Jaworski could be located; the court granted a two week continuance. A motion to compel the State to produce Jaworski[2] was filed by appellant

[1] There was testimony at trial that the woman made the purchase. The trial court concluded that only the trooper was involved in the actual transaction.

[2] It appears from the record that no action was taken by the court on this second motion to compel.



on December 2, 1977. Neither Jaworski nor Carr was present when the trial resumed on December 13, 1977.

Appellant challenges his conviction upon the following grounds:

> 1. Did the trial court err in failing to grant Defendant's Motions to Compel because the State's failure to produce the addresses of alleged informant Janice Carr or alleged informant Darlene Jaworski was prejudicial to the defense?
>
> 2. Should the Defendant's conviction be reversed because the State's failure to timely provide the Defendant with the name of the alleged informant Darlene Jaworski was prejudicial to the defense?
>
> 3. Was the judgment of the lower court that Defendant was not entrapped by the State clearly erroneous?

The trial court, in ruling upon appellant's motion for judgment of acquittal, to some extent took the wind out of the sails of all three arguments advanced by appellant by focusing upon and negating the entrapment defense itself. Appellant testified that Janice Carr made five phone calls to him offering sexual favors in return for his procuring the marijuana. Appellant's version was corroborated by Joe Jacobson[3] who testified he overheard some of appellant's conversations with Carr.

The trial court in its oral opinion concluded that the identity of the alleged informant, *i.e.*, whether it was Janice Carr or Darlene Jaworski, was a "red herring" since the real issue presented was whether appellant's evidence was sufficient to raise the entrapment issue. The trial court reviewed the testimony of the defense witnesses, including appellant's testimony, regarding the telephone calls from Janice Carr, and found none of it to be credible. The trial court, instead, chose to accept the testimony of the trooper, the only witness for the

[3] Jacobson incriminated himself by revealing that he had originally purchased the marijuana for appellant so that appellant could "get together" with Carr.

State. The following factual determination was made by the trial court:

> "[I] find that there was no entrapment. What occurred was simply this: Trooper Norman in his capacity as an undercover officer was in the Defendant's residence. And the Defendant told him that he could sell the pound of marijuana for X number of dollars. . . . The defendant went to the back of the apartment, came out with a quantity of marijuana, money changed hands."

The trial court denied appellant's motion for judgment of acquittal on the basis of this factual determination. Although the trial court only addressed the entrapment issue, we are compelled to answer appellant's issues 1 and 2 because the court's ruling might have been different if Carr or Jaworski had testified.

1

Appellant urges us to reverse his conviction because the State's failure to produce Janice Carr and Darlene Jaworski, or their present addresses, amounts to a suppression or withholding of material evidence exculpatory to the appellant and therefore violates appellant's right to due process. *Brady v. Maryland,* 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963); *Tobias v. State,* 37 Md. App. 605, 621, 378 A.2d 698 (1977); *Ross v. Warden, Maryland Penitentiary,* 1 Md. App. 46, 53, 227 A.2d 42 (1967). According to appellant, the State, the State Police, and the trooper involved should have the knowledge, resources, and control over the alleged informant, whomever she may be, to produce her to testify at trial.

Regardless of the merits of appellant's argument, we find that appellant waived the issue by failing to request a continuance under Md. Rule 527(c) and

[4] The trial court made a factual determination that the woman who accompanied the trooper to appellant's apartment was Darlene Jaworski.



choosing to proceed with his motion for judgment of acquittal. The record discloses that the appellant had information concerning the location of both Carr and Jaworski. When the trial resumed on December 13, 1977, appellant did not request a further continuance but proceeded to put on the remainder of his case. One of the witnesses called by the defense was Bernadette Carr, Janice's sister-in-law. Appellant produced three envelopes, which were given to him the morning of the second day of trial by Bernadette, with Hawaiian postmarks and containing return addresses. The names written above the addresses were Hawaiian. The envelopes were addressed to Bernadette and she identified them as having contained letters from Janice Carr. After producing the envelopes and Bernadette Carr, the appellant still did not request a continuance to explore the possibility that both Carr and Jaworski could be found at those addresses. Rather, appellant made a motion for judgment of acquittal at the close of his case.

The court throughout the pendency of the case indicated a willingness to permit appellant as much time as was necessary to locate the witnesses. Therefore, we see no basis for appellant's complaint that he was denied due process when there was a reasonable possibility that both Carr and Jaworski could be found and he sought only a judgment of acquittal rather than a further continuance.

2

Again appellant relies upon *Brady* for his position that the State suppressed the name of Darlene Jaworski by failing to divulge her name upon appellant's filing of his motion to compel. Appellant contends that at no time did the State deny that Janice Carr was the informant at the hearing on appellant's motion to produce Janice Carr. The State's failure to deny that Janice Carr was the informant and its concomitant failure to allege that Darlene Jaworski was the

informant, according to appellant, constituted an implicit admission on the part of the State that Janice Carr was the informant. Thus the appellant claims he detrimentally relied on this representation of the State and was consequently unduly prejudiced. Appellant contends further that had he known that the State would allege that Darlene Jaworski was the informant, he might have been able to procure her testimony for the trial.

Appellant attempts to buttress his position by referring to the testimony of Jaworski's ex-husband. Mr. Jaworski stated that he thought she had just recently left for Hawaii. The trial court gave little credence to Mr. Jaworski's testimony and, of course, under Md. Rule 1086, the credibility of a witness is a matter for the trial court, not for this Court. *Bailey v. State*, 16 Md. App. 83, 92, 294 A.2d 123 (1972). Moreover, we perceive no prejudice to appellant in the State's failure to divulge the name of Darlene Jaworski in light of the fact that the trooper disclosed the name at trial and the trial court then granted a continuance for twice the amount of time requested by appellant for the purpose of locating her. Thus we believe the constitutional requirement of disclosure of an informant's identity, when the informant's testimony would be helpful and relevant to the defense, was met in this case. *See Roviaro v. U.S.*, 353 U.S. 53, 60, 77 S. Ct. 623, 1 L. Ed. 2d 639 (1957). Accordingly, we find no ground for reversal here.

3

Appellant claims that the alleged informant[5] induced him to sell a pound of marijuana to the trooper by telephoning appellant five times in the course of a three week period. She purportedly offered sexual favors in return for appellant's arrangement of the transaction. As previously related, Joe Jacobson corroborated appellant's testimony.

[5] For purposes of this discussion, "informant" refers to both Janice Carr and Darlene Jaworski. The identity at this point makes little difference.



The defense of entrapment raises two questions of fact: (1) did the agent of the government induce the accused to commit the offense charged in the indictment; (2) if so, was the accused ready and willing without persuasion and was he awaiting any propitious opportunity to commit the offense. *Simmons v. State*, 8 Md. App. 355, 362, 259 A.2d 814 (1969). Appellant contends the trial court was clearly erroneous in its determination that there was no entrapment because the evidence was insufficient to enable the lower court to find beyond a reasonable doubt that there was no evidence of the inducement of appellant by the police agents to commit the offense. We disagree with appellant.

Appellant's entrapment defense was considered by that trial court upon his motion of acquittal. Thus the trial court was concerned with whether the evidence submitted, whatever its source, was sufficient to support a finding that the defendant was induced by the alleged informant to commit the offense. *Fisher v. State*, 28 Md. App. 243, 250, 345 A.2d 110 (1975), *cert. den.*, 276 Md. 743. The trial court determined that the evidence was not sufficient to support a finding that appellant was entrapped. The testimony presented by the defense on the inducement question was rejected by the trial judge. The judge chose instead to accept the trooper's version of the facts that the informant merely accompanied him to the apartment. Judging the credibility of the witnesses is the province of the trial judge and we will not interfere with his conclusions unless there is clear error. *Bailey v. State, supra*; Md. Rule 1086. We are not inclined to do so here.

Appellant states further that the State did not meet its burden of proving that the appellant had a predisposition to commit the offense. The simple answer is that without some evidence showing inducement as a matter of law, the issue of predisposition need not be addressed by the trial court on a motion for judgment of acquittal. *Fisher v. State, supra* at 251. We

find no error in the trial court's denial of appellant's motion for judgment of acquittal.

*Judgment Affirmed.*
*Costs To Be Paid By Appellant.*

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## APPENDIX B

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*In the Court of Appeals of Maryland*

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*Petition Docket No. 197*

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*September Term, 1979*

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*(No. 1156, September Term, 1978 Court of Special Appeals)*

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*Richard Leon Sherman*

*v.*

*State of Maryland*

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### ORDER

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition be, and it is hereby denied as there has been



no showing that review by certiorari is desirable and in the public interest.

/s/ ROBERT C. MURPHY,
*Chief Judge*

*Date: September 10, 1979.*

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## APPENDIX C

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October 23, 1978 Hon. Austin W. Brizendine. Judgment and Sentence: Defendant to be committed to the Department of Correction for a period of five (5) years of which 2½ years is suspended it is recommended by this Court that this Sentence imposed in this Case to run concurrently with any Sentence imposed for Violation of Probation now pending United States District Court for the District of Maryland, further Defendant to pay Court costs this Court. Appeal Bond set at $5000.00.

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## APPENDIX D

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### MARYLAND RULE OF PROCEDURE

**Rule 527. Continuance or Postponement Gen'l.**

a. *Generally.*

1. In Court's Discretion.

The court may upon motion of any party, or of its own motion, continue an action from time to time in order that a trial may be had upon the merits or as the interests of justice may require; but

2. Not Beyond Second Term Unless by Consent, for Cause, or by Rule.

No action shall be continued beyond the second term after process has been served on the defendant, unless by consent of the parties, or upon good cause shown by

the party asking the continuance, or when these Rules otherwise so provide.

(Art. 75, §§ 62, 71, 72.)

b. *Attorney in Legislature.*

When it shall appear that any attorney of record of any party to any action at law or in equity is a member of the General Assembly of Maryland or a desk officer of either House of the General Assembly, and that said General Assembly of Maryland shall then be in session, such action shall be continued from time to time until ten days after said General Assembly of Maryland shall have adjourned, unless such attorney upon the call of such action for trial waive the benefit of this Rule. When it shall appear that any attorney of record of any party to any action at law or in equity is a member of the Legislative Council of Maryland, or one of its subcommittees, such action shall be continued when the said Legislative Council, or said subcommittee, as the case may be, is holding a meeting, unless such attorney shall upon the call of such action for trial waive the benefit of this Rule. Whenever it shall be necessary to file a brief or memorandum of law in action at law or in equity, which has been continued under the provisions of this Rule, then such action shall be continued for a time sufficient to prepare and file such brief or memorandum.

(Art. 75, § 24 (1961 Supp.); amended Sept. 15, 1961).

c. *Absent Witness.*

1. Motion for Continuance — Affidavit.

A motion for a continuance or postponement on the ground that the evidence of an absent witness is wanting must be supported by an affidavit of the party making the application or of some other credible person.

2. Affidavit — Contents.

The affidavit shall show that the testimony of the absent witness is material, competent and proper, that the affiant believes that the action cannot be tried with



justice to the party without such evidence, that the affiant has used reasonable diligence to procure the same, and that the affiant has a reasonable expectation and belief that such witness can be procured within a reasonable time. The affidavit shall further show what facts the affiant believes the witness will prove, and not merely the effect of such facts in evidence, and that the affiant believes them to be true.

3. Examination by Court.

The court may examine the affiant on oath as to any of the matters alleged in the affidavit, and on what information or knowledge he believes the witness will prove what is alleged.

4. Effect of Admission.

If, upon the affidavit, or upon examination, the court is satisfied of the truth of the affidavit and that the testimony is material and competent, the court may continue or postpone the case for such time as may be deemed necessary to enable the party to procure the attendance or obtain the testimony of such absent witness, unless the opposite party will admit that the absent witness would, if present, testify to the facts alleged in the affidavit.

5. Consent to Deposition.

Where the testimony of an absent witness, whether resident or nonresident, may be taken by deposition and the opposite party will not admit that the absent witness would if present testify to the facts alleged in the affidavit, the court may grant a continuance or postponement for the purpose of taking the deposition of such absent witness.

6. Right to Impeach or Contradict.

An admission by the opposite party, or the taking of a deposition, pursuant to subsections 4 and 5 hereof, shall not deprive the opposite party of the right to impeach or contradict the testimony of the absent witness in the same manner as if such witness had been present.

(Art. 75, §§ 63-65, 70; amended Sept. 26, 1957.)

d. *When New Trial Granted or Judgment Set Aside.*

Where a new trial is granted or where a judgment shall be set aside for fraud or irregularity, the court may continue or postpone the action so long as it shall deem necessary for a trial thereof.

(Art. 75, § 66.)

e. *Costs — By Whom Paid.*

Where a continuance or postponement is granted, the court shall make such order as to costs theretofore accrued as may be just.

(Art. 75, § 73.)

**Rule 741. Discovery and Inspection.**

a. *Disclosure Without Request.*

Without the necessity of a request by the defendant, the State's Attorney shall furnish to the defendant:

1. Any material or information within his possession or control which tends to negate the guilt of the defendant as to the offense charged or would tend to reduce his punishment therefor;

2. Any relevant material or information regarding: (a) specific searches and seizures, wire taps and eavesdropping, (b) the acquisition of statements made by the defendant, and (c) pretrial identification of the defendant by a witness for the State.

3. The State's Attorney's obligations under this section extend to material and information in the possession or control of members of his staff and of any others who have participated in the investigation or evaluation of the case and who either regularly report or with reference to the particular case have reported to his office.

b. *Discovery by the Defendant.*

Upon the request of the defendant, the State shall:

1. Witnesses.

Disclose to the defendant the name and address of each person then known whom the State intends to call



as a witness at the hearing or trial to prove its case in chief or to rebut alibi testimony.

2. Statements of the Defendant.

As to all statements made by the defendant to a State agent which the State intends to use at a hearing or trial, furnish the defendant: (a) a copy of each written or recorded statement and (b) the substance of each oral statement and a copy of all reports of each oral statement.

3. Statements of Codefendants.

As to all statements made by a codefendant to a State agent which the State intends to use at a hearing or trial, unless a severance has been ordered by the court, furnish the defendant: (a) a copy of each written or recorded statement, and (b) the substance of each oral statement and a copy of all reports of each oral statement.

4. Reports of Experts.

Produce and permit the defendant to inspect and copy all written reports or statements made in connection with the particular case by each expert consulted by the State, including the results of any physical or mental examination, scientific test, experiment or comparison, and furnish the defendant with the substance of any oral report and conclusion made in connection with the particular case by each expert consulted by the State, including the results of any physical or mental examination, scientific test, experiment or comparison.

5. Evidence for Use at Trial.

Produce and permit the defendant to inspect and copy any books, papers, documents, recordings, or photographs which the State intends to use at the hearing or trial, and produce and permit the defendant to inspect and photograph any tangible objects which the State intends to use at a hearing or trial.

6. Property of the Defendant.

Produce and permit defendant to inspect, copy and photograph any item obtained from or belonging to the

defendant, whether or not the State intends to use the item at the hearing or trial.

c. *Matters Not Subject to Discovery by the Defendant.*

This Rule does not require the State to disclose:

1. Any documents to the extent that they contain the opinions, theories, or conclusions or other work product of the State's Attorney, and

2. The identity of a confidential informant so long as the failure to disclose the informant's identity does not infringe a constitutional right of the defendant, and the State's Attorney does not intend to call the informant as a witness, and

3. Any other matter if the court finds that by disclosure there is a substantial risk of harm to any person which outweighs the interest in disclosure.

d. *Discovery by the State.*

Upon the request of the State, the defendant shall:

1. Generally.

As to the person of the defendant:

(a) Appear in a lineup for identification;

(b) Speak for identification;

(c) Be fingerprinted;

(d) Pose for photographs not involving reenactment of a scene;

(e) Try on articles of clothing;

(f) Permit the taking of specimens of material under his fingernails;

(g) Permit the taking from his body of samples of blood, hair and other material involving no unreasonable intrusion upon his person;

(h) Provide specimens of his handwriting;

(i) Submit to reasonable physical or mental examination.



2. Reports of Experts.

Produce and permit the State to inspect and copy all written reports made in connection with the particular case by each expert which the defendant intends to call as a witness at the hearing or trial, including the results of any physical or mental examination, scientific test, experiment or comparison, and furnish the State with the substance of any oral report and conclusion made in connection with the particular case by an expert which the defendant intends to use at the hearing or trial, including any physical or mental examination, scientific test, experiment or comparison.

3. Alibi Witnesses.

Upon designation by the State of the time, place and date of the alleged occurrence, furnish the name and address of each witness other than the defendant whom the defendant intends to call as a witness to show he was not present at the time, place and date designated by the State in its request.

e. *Procedure for Discovery.*

1. Time for Discovery.

The State shall make disclosure pursuant to section a of this Rule within 25 days after the earlier of the appearance of counsel or the first appearance of the defendant before the court pursuant to Rule 723 (Appearance — Provision for or Waiver of Counsel). The defendant shall make a request for discovery pursuant to section b of this Rule, and the State shall make a request for discovery pursuant to section d of this Rule, within 15 days after the earlier of the appearance of counsel or the first appearance of the defendant before the court pursuant to Rule 723 (Appearance — Provision for or Waiver of Counsel). The party served with the request shall furnish the discovery required by this Rule within 10 days after receipt of the request.

2. Motion to Compel Discovery.

If discovery is not furnished as requested, a motion to compel discovery may be filed within ten days after

receipt of the discovery or after discovery should have been received, whichever is earlier. The motion shall specifically describe the matters requested which have not been furnished. An answer to the motion may be filed within five days after receipt of the motion. The court may not consider any motion to compel discovery unless the moving party certifies in the motion and sets forth specific facts to demonstrate that he has made a good faith attempt to secure the requested discovery from the opposing party and the party has not complied with the request.

f. *Continuing Duty to Disclose.*

If, subsequent to compliance with a request made under this Rule with any order compelling discovery, a party discovers additional matter previously requested and required to be furnished, he shall promptly furnish the matter to the other party or his counsel. If the additional matter is doscovered during trial, in addition to furnishing the matter promptly to the other party or his counsel, he shall notify the court that the matter is being furnished to the other party.

g. *Protective Orders.*

Upon motion and for good cause shown, the court may order that specified disclosures be restricted. If at any time during the proceedings it is brought to the attention of the court that a party has failed to comply with this Rule or an order issued pursuant to this Rule, the court may order that party to permit the discovery of the matters not previously disclosed, strike the testimony to which the undisclosed matter relates, grant a reasonable continuance, prohibit the party from introducing in evidence the matter not disclosed, grant a mistrial, or enter any other order appropriate under the circumstances. All material and information to which a party is entitled must be disclosed in time to permit beneficial use thereof.

Supreme Court, U. S.
FILED
MAR 13 1980
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1979

**No. 79-885**

RICHARD LEON SHERMAN,
*Petitioner,*

v.

STATE OF MARYLAND,
*Respondent.*

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## No. 79-885

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STATE OF MARYLAND,

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## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

### PRELIMINARY COMMENTS

This response to the Petition for Writ of Certiorari is filed pursuant to the request of this Court dated 12 February, 1980.

### JURISDICTION

Petitioner has invoked 28 U.S.C., § 1257(3).

### QUESTIONS PRESENTED

1. Whether the issues in this case establish jurisdiction in this Court.

2. Whether the State properly disclosed the name of the woman involved in the incident.

3. Whether the State properly did not produce a witness whose location it did not know.

4. Whether Petition can now complain about the alleged failure of the State to produce the witness when Petitioner chose to take the case to verdict rather than to ask for a continuance.

## STATEMENT OF FACTS

On 20 January, 1977, Petitioner sold a pound of marijuana to TFC Mickey Norman of the Maryland State Police for $400.00. TFC Norman was working undercover on narcotics and purchased the marijuana from Petitioner at Petitioner's apartment in Randallstown, Baltimore County (T. 10-12). Petitioner was tried and convicted of distributing marijuana (T. 183). He was sentenced to five (5) years in the Department of Correctional Services with two and a half years suspended (T. 15), the sentence to be concurrent with a sentence imposed by a federal court (T. 16). Petitioner appealed and his conviction was affirmed by the Court of Special Appeals in an unreported decision filed 4 June, 1979. The Court of Appeals of Maryland denied Petitioner's petition for a Writ of Certiorari on 10 September, 1979.

At trial Petitioner raised the defense of entrapment. Petitioner sought as a witness a woman who had accompanied TFC Norman to Petitioner's apartment. Petitioner claimed the woman was a police agent and had entrapped him.

Petitioner filed a motion to produce the woman, believed to be Janice Carr. A hearing on the motion was held on 16 November, 1979. At that time, the trial judge did not grant the motion as the prosecutor agreed to try to locate the woman (T. 3).



Trial commenced on 28 November, 1977. TFC Norman stated that the woman was not Janice Carr but was named Darlene Jaworski (T. 14-15). TFC Norman stated that he had information that perhaps Carr and Jaworski, who were apparently sisters, were either in Hawaii or Colorado (T. 21-22). The defense produced Edward Jaworski, the ex-husband of Darlene Jaworski and current client of the defense attorney's law firm. Mr. Jaworski testified that both Janice and Darlene were in Hawaii (T. 107-116). Defense counsel then requested a week continuance to locate Darlene and the court granted a two week continuance (T. 118). On 2 December, 1977, a motion to compel the State to produce Darlene Jaworski was filed. It appears from the record that no action was taken on this motion.

Trial resumed on 13 December, 1977 and neither Carr nor Jaworski were present. Defense testimony was heard from Bernadette Carr (T. 129-143) and Stephen Johnson (T. 143-151). Bernadette Carr, Janice's sister-in-law, testified that she received mail from Janice mailed from Hawaii (T. 137-139). Johnson, Bernadette's fiance, testified that he once answered the telephone, receiving a call for Bernadette from Janice in Hawaii (T. 148-149). There was no further testimony.

Both sides rested and Petitioner made a motion for judgment of acquittal (T. 153). Petitioner argued his motion at length (T. 154-167), specifically urging the court to accept the defense of entrapment. The trial judge found the Petitioner guilty (T. 183).

## ARGUMENT

### I.

### THE ISSUES IN THIS CASE DO NOT ESTABLISH JURISDICTION OF THIS COURT.

Petitioner bases the jurisdiction on 28 U.S.C., § 1257(3) which provides:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * * *
>
> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

However, the issues in this case are such that Petitioner cannot claim any title, right, privilege or immunity under the Constitution, treaties or statutes of the United States.

The basis of Petitioner's defense at trial and the basis of his appeal is the entrapment defense. However, there is no constitutional basis for the entrapment defense and hence jurisdiction under 28 U.S.C., § 1257(3) is not appropriate in this case.

In *Sorrells v. United States*, 287 U.S. 435 (1932), this Court first recognized the entrapment defense but held that it was based on a matter of statutory construction, not a Constitutional right. 287 U.S. at 448. The issue arose again in *United States v. Russell*, 411 U.S. 423 (1973) wherein respondent's "principal contention [was] that the defense should rest on constitutional grounds," 411 U.S. at



430. This Court specifically rejected that contention, 411 U.S. at 432-433. This holding was not disturbed in *Hampton v. United States*, 425 U.S. 484, 489-490 (1976).

Thus, because entrapment does not give rise to a due process claim and is not of a constitutional dimension, any petition based on it does not fall within the jurisdiction of 28 U.S.C., § 1257(3) and should therefore be denied.

Furthermore, *Roviaro v. United States*, 353 U.S. 53 (1957), cited at length by Petitioner, likewise does not provide a federal question on which Petitioner may base his case. Nowhere in *Roviaro* does this Court hold or suggest that Roviaro had a constitutional right to force the Government to disclose the name of its informant. Rather, the *Roviaro* holding is based on federal court procedure and law and hence does not create a constitutional right upon which Petitioner can base his claim.

### II.

### THE STATE DID NOT FAIL TO DISCLOSE THE NAME OF THE WOMAN INVOLVED IN THE INCIDENT.

Petitioner claims that the State wrongfully withheld the fact that the woman[1] involved in the incident was named Darlene Jaworski and not Janice Carr. Although the record in this case is confusing and unclear, it is obvious that the State never informed Petitioner or his trial counsel that the woman was named Janice Carr. There was no attempt to obscure the issue or to mislead counsel. Rather, the defense originated the belief that Janice Carr was the woman involved. When TFC Mickey Norman testified, it was then discovered that apparently the woman involved was named Darlene Jaworski.

---

[1] Petitioner characterizes the woman as an "informant". Note, however, that the undercover officer involved was unable to say whether she was an informant (T. 16).

Even if the Court were to believe that the State constructively erred by not somehow demonstrating that Darlene Jaworski was the woman involved, the error was harmless. Petitioner suggests that since this information was not received until the "final day of trial" (p. 4), it was too late to ha e any effect. Actually TFC Norman stated that the woman involved was Darlene Jaworski on the *first* day of trial, 28 November, 1977. Thereafter, the trial was continued for two weeks so as to give the defense an opportunity to locate Jaworski. Trial resumed on 13 December, 1977. Thus, Petitioner had full opportunity to make use of that knowledge and presumably could have had more opportunity if he had requested another continuance.

Petitioner suggests that Darlene Jaworski might have left the Baltimore area during the period between the filing of Petitioner's motion to produce (25 October, 1977) and TFC Norman's testimony (28 November, 1977). The sole basis for that suggestion is the testimony of Jaworski's ex-husband who stated that to the best of his knowledge his former wife had "just recently" gone to Hawaii (T. 113-114). The Maryland Court of Special Appeals wrote that the "trial court gave little credence to Mr. Jaworksi's testimony and . . . the crediblity of a witness is a matter for the trial court". Furthermore, TFC Norman testified that he had "information, if you can call it that, that's as old as two months ago that she may be either in Colorado or Hawaii" (T. 22).

Thus, the dictates of *Roviaro v. United States*, 353 U.S. 53 (1957) were satisfied. The name of the woman involved was made known to Petitioner and Petitioner was given ample time to act on that information.



## III.

### THE STATE DID NOT ERR BY FAILING TO PRODUCE THE WOMAN INVOLVED IN THE INCIDENT.

The record is clear that the State was unable to produce the woman involved, be it Janice Carr or Darlene Jaworski. TFC Norman testified that his only information, two months old, was that Carr and Jaworski were either in Colorado or Hawaii (T. 22). There was no indication that the State had any additional information or more current locations for Carr and Jaworski.

On the other hand, the defense had considerable "family contacts" with the missing sisters. During the first day of trial [28 November, 1977], the defense produced Edward Jaworski, former husband of Darlene and current client of the defense attorney's law firm. Jaworski testified that his ex-wife was in Hawaii (T. 107-116). When trial resumed on 13 December, 1977, the defense produced testimony from Bernadette Carr, Janice's sister-in-law, and Stephen Johnson, Bernadette's fiance (T. 129-151). They testified as to receiving mail and a telephone call from Janice in Hawaii.

Thus, it is apparent that while the State had no knowledge of or connection with Carr and Jaworski, the defense had a great deal. Clearly, Petitioner's trial counsel had considerable contact with Carr's and Jaworski's relatives and had the only current information produced in court as to the sisters' whereabouts. Certainly the State could not have produced witnesses whose location it did not know and, if anyone had the ability to locate Carr of Jaworski, it was the defense.

## IV.

**PETITIONER CANNOT NOW COMPLAIN ABOUT THE ALLEGED FAILURE OF THE STATE TO PRODUCE THE WITNESS AS PETITIONER CHOSE TO TAKE THE CASE TO VERDICT RATHER THAN TO ASK FOR A CONTINUANCE.**

During the second day of the trial, the defense produced additional testimony concerning letters and a telephone call from Janice Carr in Hawaii. The letters came in envelopes containing return addresses. Thus, there was a chance that Carr or Jaworski could have been located, particularly given the family relationships between the sisters and the defense witnesses. Yet Petitioner did not seek another continuance but rather chose to conclude the case and ask for an acquittal.

Petitioner did not renew his motion to compel production of Janice Carr or ask for a ruling on his motion to produce Darlene Jaworski. Petitioner had apparently abandoned any interest in the motions to compel production and hence waived the issue by his actions and inactions.

Furthermore, Petitioner could have requested a further continuance.[2] The trial judge had earlier shown his willingness to grant a continuance and had given Petition a continuance twice as long as he had requested. Instead Petitioner chose to put on witnesses, rest his case, and proceed to verdict.

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[2] Petitioner notes the requirements of Maryland Rule 527(c)(2) concerning continuances. However, Rule 527(c)(2) applies only to civil cases, Maryland Rule 1.



## CONCLUSION

For the foregoing reasons, Respondent respectfully requests this Honorable Court to deny the petition for writ of certiorari.

Respectfully submitted,

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